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SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1009

John N. Flood and Catherine Flood,

Petitioners,

vs

Commissioner of Internal Revenue,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

John N. Flood MD, JD
10122 Kaimu Drive
Huntington Beach,
California 92646
Petitioner

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SUPREME COURT OF THE UNITED STATES

October Term, 1972

John N. Flood and Catherine Flood,

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Commissioner of Internal Revenue,

Respondent.

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Ninth Circuit

Petitioners, John N. Flood and Catherine Flood pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled cause on October 20, 1972

Respectfully Submitted,

John N. Flood MD,JD
Petitioner

Catherine I Flood
Petitioner

CITATIONS TO OPINIONS

The Opinion of the Ninth Circuit Court of Appeals is reprinted in Appendix A hereto. It does not appear to have been reported.

The Opinion of the Tax Court is reprinted in Appendix B hereto. It does not appear to have been reported.

JURISDICTION

The Opinion and Judgment of the Ninth Circuit Court of Appeals was entered on October 20, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254 (1).

STATUTE

Tax Court Rule 19(f). ..No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

THE QUESTIONS PRESENTED ARE:

(1) Did the lower court depart from accepted and usual course of judicial proceedings, or so far sanction such a departure by a lower court as to call for an exercise of this court's power of supervision:

(a) By basing a decision on a document (general power of attorney) never introduced into evidence?

(b) By basing a decision on the extra-judicial presumption of the contents of said power of attorney form not in evidence?

(c) By presuming authorization in a general power of authority form for specific acts requiring express authority--not presumed in a general form?

See IRC section 601.502 (c)(1)(ii)(iv) and 9 Mertens Law of Federal Income Taxation sec 49.226, p442 fn 23 (1971 ed)

(d) By permitting and condoning the filing of ex parte affidavits dir-

ectly with the Tax Court judge assigned to hear petitioner's case, prior to the hearing, without ever providing a copy of said affidavit to petitioner?

(e) By assuming facts not in evidence, and such assumption of facts being false?

(f) By excluding relevant and necessary evidence to prove petitioner's case?

(g) By ignoring uncontradicted testimony of both parties and holding contrary to such testimony?

(h) By interpreting Commissioner v Hansen (1959) 360 US 446 to permit taxation a second time of petitioner's dealer reserves for years of 1951, 1952, etc., in absence of fraud?

(2) Is it a denial of equal protection of the law to tax petitioner's pre-1954 dealer reserves a second time where these reserves are exempt otherwise?

(3) Is it denial of due process of law for the Government to require a taxpayer to sign a general power of attorney, and then to deny relief to him because he signed it?

(4) Is it denial of due process of law to deny relief to petitioner because he didn't file a timely appeal where an unauthorized stipulation had been signed which waived all petitioner's rights in advance and where petitioner was unaware of the contents of the stipulation for many years?

(5) Is it Fundamentally unfair and a denial of due process of law and denial of equal protection of the law on the basis of wealth that because petitioner could not pay a lump sum legal fee of $1500 in advance, that he be denied a day in Tax Court on the merits of his tax liability, when petitioner's counsel refused to prepare the case for trial

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without the prepayment of the lump sum legal fee of $1500 and instead, without petitioner's knowledge or prior authoriation, misused a government-required power of attorney, and signed a stipulation committing petitioner to pay in excess of $35,000.00 in taxes, interest, and penalties on dealer reserves already reported in tax returns already filed and taxes paid thereon for years of 1951, 1952, etc.?

(6) Is the ruling in Commissioner v Hansen (1959) 360 US 446 being applied in an unconstitutional manner by the Commissioner of Internal Revenue and by the lower court by making a rebuttable presumption conclusive and by precluding petitioner his right to offer proof to show that there was no net income to tax?

(7) Did implied false representations to the Tax Court by counsel for petitioner constitute fraud upon it?

(8) Where Commissioner v Hansen (1959) 360 US 446 is being used as a guise to tax petitioners a second time on 1951 and 1952 dealer reserves, and where it is being applied in an unconstitutional manner to petitioners, and where it appears that it represents a misapplication of the "claim of right" doctrine, should Commissioner v Hansen be overruled?

(9) Where it appears that no one knows what relief is available under Tax Court Rule 19(f), and where it appears that this rule should be equated with Federal Rule of Civil Procedure 60(b)(6), should not this Court, in the exercise of its supervisory power, rule that the relief available under Tax Court Rule 19(f) is the same as that available in other Federal Courts under Federal Rule of Civil Procedure 60(b)(6)?

STATEMENT OF THE CASE

This proceeding arose out of motions by petitioners under Tax Court Rule 19 (f) for leave to file motions to vacate two Tax Court Decisions entered in 1962 in Docket Nos. 86926 and 86927. The motions for leave were filed with the Tax Court in July, 1969. Thereafter a hearing was scheduled and held without notice to the petitioners and relief was denied to petitioners in a Tax Court Decision. 28 TCM 1277.

About eight months after this decision, petitioners became aware that their motion was denied and notified the Tax Court that they had not been notified. The decision in 28 TCM was then vacated and another hearing scheduled with notice to petitioners for Sept. 21, 1970. Relief was denied in a Memorandum and Order dated February 5, 1971. This opinion does not appear to be reported.

An appeal was taken from the Tax Court Opinion and Order of February 5, 1971 to the Ninth Circuit Court of Appeals. In a very short Opinion and Order the Ninth Circuit Court of Appeals affirmed the Tax Court on October 20, 1972.

This petition for Certiorari follows.

Petitioners have paid approximately $22,000.00 of the $35,000.00 assessed in the taxes, interest, and penalties, and could not pay any more because the tax liens were a key factor in destroying their business and credit standing.

After the 1969 denial of relief by the Tax Court in 28 TCM 1277, Respondent Commissioner instituted a civil action No. 70-764-MML in Federal District Court (USDC CD Cal) to reduce the 1962 Tax Court decisions to District Court judgment. This latter District Court action is now stayed pending this petition.

STATEMENT OF FACTS

This proceeding arises out of a decision of the United States Tax Court (Record pg 180-195) and order (R. p 195) denying petitioners' motions (R 44) for special leave to file the accompanying motions to vacate (Supp R) the decisions of the Tax Court entered June 7, 1962 (R 41) and June 14, 1962 (R 43), entered upon stipulations which purported to determine that taxes, interest, and penalties in excess of $35,000.00, as a total tax liability, was due from petitioners for years 1951, 1952, etc.

An election had been filed by petitioners but this did not preclude the determination of petitioners' overall tax liability. Treasury Regulation 1.9002-1(b), 1961 which stated : "The election under the Dealer Reserve Adjustment Act may be made even though

the taxpayer is litigating his liability for income tax based upon his treatment of dealer reserve income.. and an election does not constitute a waiver of his right to continue pending litigation.. until final determination.."

At the Tax Court hearing on September 21, 1970, petitioners had offered to prove that there was no fraud and no charge of fraud against the petitioners. That the dealer reserves had already been included in tax returns filed prior to the instant second assessment being contested by petitioners. That the reserves for 1951 had a five-year holding period and had been received and included in tax returns for the years up to 1956. That the reserves for the year of 1952 had been included in tax returns filed for years up to 1957. That reserves had been lost in subsequent repossessions due to faulty construction (Tr 17-18)

of the product; and that none of the income credited on the books of the finance companies for the years of 1951 and 1952 was, in effect, or in fact, or in substance, actually received as income. (Tr 17-18) That the taxes assessed against the petitioners, in fact and in substance, have been taxes on income never received, and are taxes which were never owed. That the true picture had never been presented to the Tax Court. That assessments in excess of $35,000.00 have been made against the petitioners on taxes, interest, and penalties on income never received. (Tr 18), and never owed. That the tax returns of petitioners were before counsel for petitioners and before counsel for respondent Commissioner at the time of the signing of the stipulations in issue; and that counsel for both parties knew, or should have known, that the petitioners owed no taxes. And with

the knowledge that the petitioners owed no taxes--both counsel signed stipulations committing a total payment in excess of $35,000.00 in taxes, interest, and penalties from petitioners. Petitioners were not permitted to introduce this evidence at the Tax Court hearing.

Petitioners introduced evidence that the Los Angeles area did not tax dealer reserves built up prior to 1954 (Tr 47). Congressional History indicates that it was the intent of Congress that reserves should not be taxed twice (double taxation) for any given year, and that reserves built up prior to 1954 need not be taxed. U. S. Code and Administrative News 2 86 th Cong Second Session, 1960, p 1987; Colony Motors v United States 280 F Supp 235, 1967. In the instant case, petitioners were taxed by the Milwaukee office of respondent Commissioner a second time on pre-1954 reserves.

Prior to the Tax Court hearing on September 21, 1970, the former counsel for petitioners filed ex parte affidavits in opposition to the petitioners' motions. (Petioners' exhibit #6 which was a letter from said counsel stating that he had filed said affidavits, letter of 7/22/70.) The correspondence and affidavits had been sent directly to the Tax Court judges assigned to the hearing on petitioner's motion. No copy of said correspondence or affidavits was ever made available to the petitioners.

Petitioners testified that a general power of attorney given to former counsel did not authorize the signing of the stipulations without the prior knowledge and approval of petitioners, and that the power of attorney was intended for procedural matters only. (Hearing transcript 26, 27) Petitioners' former counsel testified that he never

relied on any power of attorney in signing the stipulations involved herein. (Tr 81) Both petitioners and their former counsel testified that the power of attorney form played no part in the handling of the stipulations. However, the Tax Court refused to accept this uncontroverted testimony of both parties and insisted that the power of attorney controlled the signing of the stipulations.

No power of attorney form was introduced into evidence at the hearing; and no power of attorney form was in the record before the court. However, the Tax Court based its decision on what it assumed and presumed to be contained in the power of attorney form.

Counsel for petitioners demanded a lump sum payment for legal fees of $1500.00 in advance of preparation for the Tax Court trial. (Petitioners' exhibit #1.). They were unable to pay.

Petitioners' exhibit #1 demanding the lump sum payment of $1500.00 reads:

"..unless I hear from you promptly I'll settle for the full amount & you will have to pay it."

As a result, the unauthorized stipulations were signed without prior knowledge or authorization of the petitioners, and resulted in the 1962 Tax Court decisions resulting in assessment of taxes, interest, and penalties in excess of $35,000.00 against the petitioners.

The petitioners were not permitted to carry a bad debt reserve for these years of 1951 and 1952.

It appears to petitioners that fraud was perpetrated upon the Tax Court by counsel in signing the stipulations. (Record p 178, 179)(Hearing 25,26). (Appeal brief, p 10.)

When the petitioners became aware

of the stipulated Tax Court judgment, they attempted to pay on the obligation and at the same time attempted to obtain relief from the Milwaukee, Los Angeles and Orange County offices of the Internal Revenue Service. Petitioners were told that nothing could be done except to commit suicide. Petitioners were also told that relief could be given administratively--and later relief was denied administratively.(See Record 69-74, Hearing 17-19, 45-47, and 48)

The petitioners sought relief in United States District Court and relief was summarily denied. Flood v C.I.R. (1967) 275 F Supp 801. Immediately after the petitioners learned of the decision in Kenner v CIR 7 Cir 1968, 387 F2d 689, petitioners filed the original motions for leave to file motions to vacate under Tax Court Rule 19 (f). These were filed in 1969.

REASONS FOR GRANTING THE WRIT:

The lower court departed from accepted and the usual course of judicial proceedings, or so far sanctioned such a departure by the United States Tax Court as to call for an exercise of this court's power of supervision.

The Tax Court based its denial of relief on a document (general power of attorney form) never introduced into evidence. The Tax Court assumed and presumed the contents of said document, in large part upon speculation as to its content and wording.

In a reported case, S. Mesi (CA-7) 242 F2d 558, a Tax Court decision was reversed where a Tax Court decision was based on a document not appearing in the record (stipulation).

At oral arguments in the instant case, it appeared that all agreed that the instant Tax Court decision was

improperly based on a document not in evidence and should be reversed. Yet the Tax Court decision was affirmed--apparently on the basis that the result was justified by Commissioner v Hansen (1959) 360 US 446. The petitioners urge that this departure from proper judicial procedure requires the supervisory powers of this court to review the decision below.

The Tax Court violated the statutory requirement that specific authorization be granted in a power of attorney in order to waive petitioners' rights in advance and to settle or to commit petitioners to the payment of large sums in taxes, interest, and penalties. A general power of attorney is not to be construed as granting such authority and such authority must be expressly authorized on the face of the power of attorney signed by petitioners. Please see

IRC Sec. 601.502 (c)(1)(ii)(iv). and 9 Mertens Law of Federal Income Taxation (1971 ed) sec 49.226, p 442 fn 23:

> "Certain authority must be expressly granted in the power and will not be presumed to have been intended under a general authorization."

The Tax Court violated these rules and was affirmed by the Court of Appeals. Petitioners urge that this requires review by this court.

Both petitioner and his former counsel testified at the Tax Court hearing that the power of attorney played no part in the signing of the stipulations in 1962. Yet the Tax Court disregarded this uncontradicted testimony of both parties and held that the general power of attorney controlled the situation and that the general power suthorized the signing of the stipulations and that therefore relief should be denied.

Ex parte affidavits had been sent directly to the Tax Court judge assigned to hear petitioners' case in opposition to petitioners by the former counsel for petitioners. No copy of these affidavits were provided to petitioners, and they have never seen them or the contents thereof. Therefore, petitioners have been unable to rebut the contents of these affidavits.

This is denial of due process of law to petitioners under the Fifth Amendment and denial of the right of confrontation and cross examination under the Sixth Amendment. Petitioners urge that this likewise requires the exercise of the supervisory powers of this court in the instant case.

The petitioners at the Tax Court hearing attempted to introduce into evidence their tax returns so as to show that no taxes were due at the time that

the stipulations were signed in 1962. The Tax Court denied petitioners' attempt to introduce this relevant and necessary evidence for proof of the case.

Facts were assumed which were false. The Tax Court assumed that the petitioner was in Wisconsin to defend against a pre-judgment garnishment action brought by petitioners' former counsel and that because petitioners did not counterclaim against him in that action, that therefore relief should be denied in the instant case. The true facts are that petitioner moved to California in 1962 and was not in Wisconsin to defend against the default judgment in a later year. The Wisconsin pre-judgment garnishment statute involved was subsequently declared unconstitutional in Sniadach v Family Finance Corp, (1969) 23 LEd 2d 349 and in Larson v Fetherton (1969) ___Wis ___, 172 NW 2d 20.

In the instant case, the petitioners had filed tax returns for all years from 1951 through 1960 and had paid the taxes due. The dealer reserves for 1951 and 1952 had a 5-year holding period as a maximum. Therefore, all dealer reserves for the year of 1951 had been received and had been included in Tax Returns filed by the year of 1956. Likewise, all dealer reserves for the year of 1952 had been received and included in tax returns by the year of 1957 return. In 1962, when respondent through the Milwaukee office, picked out the reserves for the years of 1951 and 1952, he was taxing these reserves a second time.

In the Los Angeles area, pre-1954 dealer reserves were not taxed.

This constitutes denial of equal protection of the laws to petitioners. Not only was there unequal application of the tax laws discriminating against

etitioners--but, in addition, in the
nstant case, 1951 and 1952 dealer reserves
f petitioners were taxed twice in the
bsence of fraud or any charge of fraud.
his constitutes unconstitutional
iscrimination against petitioners
nder the Fifth Amendment. Tax laws
equire uniformity in application.
onstitution of the United States, Art.
, Sec 2, clause 3; Rev Rul 59-250,
B 1959-2, p 134; 1 Mertens Law of
ederal Income Taxation, sec 4.07, pg 8,
h 4, fn 34, sec 4.12, ch 4, pg 19, fn
2.

The respondent Commissioner and the
ower courts have interpreted Commission-
r v Hansen (1959) 360 US 446 to permit
he unconstitutional and unjust results
erpetrated against the petitioners by
he respondent. This is clearly an
rroneous interpretation of the holding
f this court in the above case, and

petitioners urge this court to grant this petition for writ of certiorari to correct the unjust and discriminatory practices of respondent Commissioner under the guise of carrying out the ruling in Commissioner v Hansen (1959) 360 US 446.

The Government requires taxpayers to sign a power of attorney. IRC Sec 601.502 (c)(1). Then, the Tax Court states in its decision that relief be denied to petitioners because they complied with the Government requirement of signing the power of attorney. This is clearly arbitrary and denial of due process of law.

Because petitioners could not pay a lump sum payment in advance of $1500.00 the tax counsel refused to prepare for the Tax Court trial--and instead signed an unauthorized stipulation committing petitioners to pay over $35,000.00 in

taxes, interest, and penalties where taxes had already been paid on these items for 1951 and 1952. This was a second taxation of these items. This is denial of equal protection of the law on the basis of wealth. If the petitioners had the money to pay the $1500.00 legal fee in advance, then they would have had their day in court. In the instant case, they couldn't pay the large fee in advance, and they were denied their day in court on the merits of the tax liability.

According to a line of cases beginning with Griffin v Illinois (1955) 351 US 12, 100 LEd 891, this court has consistently held that "There can be no equal justice where the kind of trial a man gets depends on the money he has." It is clear that the petitioners have been denied their day in court and have been denied equal protection of law.

Respondent Commissioner and the lower Courts interpret Commissioner v Hansen (1959) 360 US 446 to authorize the unconstitutional acts and injustices as alleged herein. Respondent claims that the mere entry on books of a finance company requires payment of taxes on such reserves even a second time, as net income. No bad debt reserve is permitted to petitioners for 1951 and 1952. The tax is considered as conclusively established. There is no opportuinty available to petitioners to show that said reserves for the years of 1951 and 1952 had been included in returns already filed, or that they were lost in repossession losses and were never in fact received. This is clearly unconstitutional in that a rebuttable presumption is made conclusive against the petitioners. This is an attempt to enact into existence net profit where no net profit exists.

This is unconstitutional as indicated in Heiner v Donnan, 285 US 312, 52 SCt 360 at 363, 364, 365.

The result of the unauthorized stipulations and the 1962 Tax Court decisions has been destruction of the business of the petitioners, destruction of their credit, and near insolvency approaching bankruptcy. Assets have been seized, wages levied upon, automobiles impounded, and a state of affairs which has made it impossible for petitioner to have the required peace of mind to practice his profession.

It is the contention that certain implied representations were made to the Tax Court when the unauthorized stipulations were signed and submitted to the Tax Court which were, in fact, false representations and constituted "Fraud upon the Court" under the rule Hazel Atlas v Hartford Empire Co (1944)

322 US 238. These false implied representations entitle petitioners to relief from the 1962 Tax Court stipulations and the Tax Court decisions based thereon.

It is the contention of the petitioners that the Tax Court should have granted their motion for leave to file their motion to vacate the 1962 Tax Court decisions. It is also the contention of the petitioners that the Ninth Circuit Court of Appeals should have reversed the Tax Court denial of relief to petitioners.

For the reasons as stated herein, the petitioners pray that this court will grant their petition for writ of certiorari and review the decisions of the courts below and grant relief to the petitioners.

CONCLUSION

The lower courts departed from accepted and the usual course of judicial proceedings, or so far sanctioned such a departure by the United States Tax Court as to call for an exercise of this Court's power of supervision. The petitioners have been denied their constitutional rights of due proces of law and equal protection of the law by respondent Commissioner and by the lower courts in the Instant case. The case of Commissioner v Hansen (1959) 360 US 446 should be reviewed, clarified, and perhaps overruled so that it cannot be used as a guise to tax petitioners a second time on dealer reserves. Tax Court Rule 19 (f) should be clarified and perhaps relief thereunder equated with FRCP 60 (b) (6). For these reasons the instant Petition for Writ of Certiorari should be granted.

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN N. FLOOD and CATHERINE FLOOD,
Petitioners-Appellants,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.
No. 71-1329

[October 20, 1972]

On Petition to Review a Decision of the Tax Court of the United States

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Before: DUNIWAY and WRIGHT, Circuit Judges, and PREGERSON, District Judge.*

WRIGHT, Circuit Judge:

The Tax Court denied petitioners' request for special leave to file a motion to vacate two Tax Court decisions which had become final in 1962, seven years earlier. Dr. and Mrs. Flood had not appealed the 1962 decisions, which had been based on settlement stipulations signed by their attorney of record at that time. In their motion for special leave, they urged that their attorney had perpetrated a fraud upon the court by entering into the stipulations knowing that the petitioners did not owe the largest part of the taxes involved, and also that he signed them without authority.

The Tax Court granted petitioners a full and fair hearing on their claims. After giving careful consideration to the briefs and oral argument of petitioners, we conclude that the Tax Court did not abuse its discretion in denying the motion for special leave.

---

*Honorable Harry Pregerson, United States District Judge, Central District of California, sitting by designation.

Appendix A

2 *John N. Flood, et ux. vs. Commissioner of Internal Revenue*

The stipulations upon which the Tax Court decisions were based were entered into by a lawyer to whom the Floods had given a general power of attorney. The record of the most recent Tax Court hearing, from which this appeal is taken, demonstrates beyond question that petitioners were well represented in 1962 by skilled tax counsel, an expert in the field. Acting under a general power of attorney, he settled the tax claim against the Floods on the basis of a recent Supreme Court decision. Petitioners' criticism of their former counsel is completely unwarranted.

Affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 10-25-72—380

Appendix B

UNITED STATES TAX COURT

Washington

JOHN N. FLOOD and CATHERINE FLOOD,	)	Docket
Petitioners	)	Nos.
v	)	86926
COMMISSIONER OF INTERNAL REVENUE,	)	86927
Respondent	)	

MEMORANDUM AND ORDER

This proceeding arises out of a motion by petitioners for leave to file motions to vacate two stipulated decisions entered by this Court in 1962. The basis for such motion is the petitioners' allegation that the 1962 decisions were the result of fraud perpetrated on this Court. It is necessary, therefore, to review the facts which led up to the 1962 decisions. Dr. John N. Flood will sometimes be referred to as the petitioner.

In the years 1951, 1952, 1953, and

1954, the petitioner was in the business of selling mobile homes and trailers in Wisconsin. He undertook such business activity to supplement his financial resources while attending medical school and serving an internship in a hospital in that area; he has since become a doctor and, at the time of the hearing on this motion, resided in Huntington Beach, California. In connection with the petitioner's mobile home business, a dispute arose with respect to the petitioner's tax liability. With respect to those aspects of the dispute where no agreement could be reached, the respondent issued two deficiency notices dated February 29, 1960. One such notice was addressed to both petitioners, and determined total deficiencies of $16,155.46 and total penalties of $6,843.95 for the years 1951, 1952, and 1954. The other such notice was addressed to Dr. Flood alone, and

determined a deficiency of $1,102.43 and total penalties of $676.94 for the year 1953.

In 1958, when it became apparent that there would be tax problems with respect to the earlier years, Charles E. Prieve, a Milwaukee attorney, was engaged to represent the petitioner. Mr. Prieve was admitted to the bar in Wisconsin in 1941, was admitted to practice before this Court in 1943, and has concentrated his law practice primarily in the field of taxation. In connection this attorney-client relationship, the petitioner executed a power of attorney form giving broad powers to Mr. Prieve in the performance of his professional services. The power of attorney was never revoked by the petitioner as of the time of the hearing; Mr. Prieve was not withdrawn as the petitioners' counsel of record until August 1970. Other

than the power of attorney, there was no specific agreement or understanding between the petitioners and Mr. Prieve with respect to the latter's powers as the petitioners' representative.

Mr. Prieve represented the petitioners with respect to these tax matters in the contacts with the Internal Revenue Service. Such representation also included discussions and conferences with the petitioners' accountant; the petitioner himself attended some such conferences. The attorney-client relationship was strained at times because of the petitioner's slowness in paying Mr. Prieve's fees, but the attorney billed the petitioner at a lower rate than usual in recognition of the financial difficulties he was then having.

Mr. Prieve's efforts culminated in two decisions of this Court entered in June 1962, based upon stipulations which

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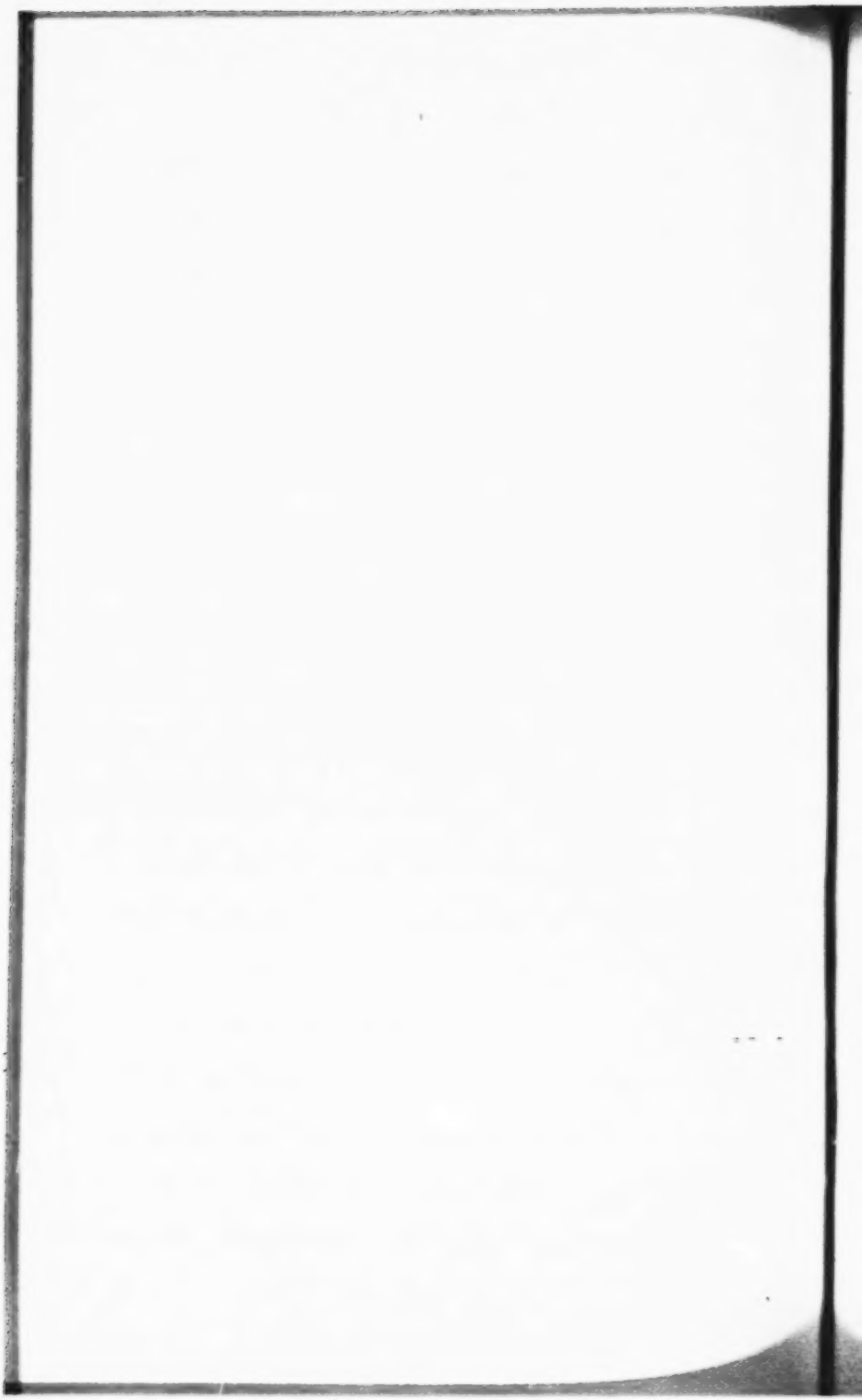
accurately represented Mr. Prieve's under-understanding as to the resolution of the issues. The decision in docket No. 86926, entered on June 7, provided that both petitioners' remaining tax liability for the years 1951, 1952, and 1954, was $3,876.95, including the total amount of deficiencies and penalties for those years, and reduced by overpayments for 1952 and 1954. The decision in docket No. 86927, entered on June 14, provided that the petitioner owed no deficiency but $238.34 in penalties for 1953. However, one source of dispute reflected in the February 1960 deficiency notices, the treatment of the petitioner's dealer reserves in connection with the mobile home business, was substantially settled by an election filed by the petitioners with the Government in August or September 1960; thus, the treatment of such reserves was not a major factor in the deficiencies stipulated to

in 1962.

The petitioners claim that, at the time the stipulations were filed, they had no specific knowledge that such action was being taken; but they learned of the Tax Court decisions sometime in 1962. However, they made no effort to protest to this Court at that time, that the decisions were entered without authorization or by fraud. The decisions were never appealed. On September 29, 1963, Dr. Flood went to Mr. Prieve's office and asked for the attorney's files on this case, which Mr. Prieve turned over to him. The conversation between the petitioner and the attorney at that time was friendly, and the petitioner made no allegation of fraud, nor did he mention being unhappy with the decisions or anything else pertaining to the disposition of the case. Had the petitioner shown any dissatisfaction, Mr. Prieve would not



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have delivered over his files.

Meanwhile, in March 1963, Mr. Prieve had brought suit against Dr. Flood to collect fees which the petitioner had not paid despite numerous letters. The petitioner defaulted in this litigation, and the fees were ultimately collected.

The petitioner brought suit in 1967 in the United States District Court for the Eastern District of Wisconsin, with respect to the taxation of the dealer reserves for the years 1951 and 1952. The petitioner asked (1) that the respondent be enjoined from collecting the tax on the dealer reserves, (2) that the court issue a declaration that the tax on dealer reserves was unconstitutional, and (3) that he be granted a refund of taxes paid for those years. The district court denied all three of the petitioner's requests, and the Seventh Circuit of Appeals subsequently affirmed that decision. Flood

v Commissioner, 275 F Supp. 801 (E. D. Wis. 1967), aff'd. in an unreported decision (C.A. 7, 1968, 22 A.F.T.R. 2d 5672, 68-2 U.S.T.C. par. 9642). The opinions of the courts in that litigation do not make any reference to the 1962 Tax Court decisions, nor is there any indication that petitioner alleged that he had been the victim of fraud in any tax proceedings.

The first effort made by the petitioners to have the 1962 Tax Court decisions set aside was their filing, in 1969, of the motions presently under consideration. The first hearing in this matter was held in October 1969 before Judge Mulroney, but the petitioners did not appear, nor did anyone representing them. Subsequently, Judge Mulroney issued a memorandum opinion (T. C. Memo. 1969-249) holding that the petitioners did not, in their previously submitted legal arguments, establish a ground for fraud on the court,

and he entered an order denying the petitioners' motion. However, the petitioners later brought to the Court's attention that they had received no notice of the October 1969 hearing. In order to assure that the petitioners would not be prejudiced by that lack of notice, and to allow them their day in court, this Court vacated and set aside its order, and scheduled another hearing in September 1970, which was held with Dr. Flood appearing on behalf of himself and his wife.

Specifically, the petitioners have charged that their counsel at the time of the entry of the stipulated decisions committed fraud upon the Tax Court by his signing the stipulation. The petitioners contend that, by signing the stipulation, Mr. Prieve falsely and fraudulently represented that he had the authority to enter into such stipulations on behalf of the petitioners, that the petitioners knew

of and approved of the fact that the stipulation was being entered, and that there were no substantive merits to the petitioners' case. Further, the petitioners have charged that the counsel for the respondent who signed the stipulated decisions committed fraud upon the Tax Court because he knew that the petitioners really should not have had to pay the tax on the dealer reserves.

Ordinarily, a decision of this Court becomes final 3 months after it is rendered, if no appeal has been taken within that period; and this Court is then powerless to reconsider or set aside such a decision. Sections 7481, 7483, Internal Revenue Code of 1954; Lasky v Commissioner, 235 F2d 97 (C.A. 9, 1956, affd. per curiam 352 U.S. 1027 (1957). The petitioner has not argued that the change in status of this Court from an executive agency to an Article I court affects the applica-

bility of Lasky. Therefore, the question is whether there are any circumstances under which the general rule stated in Lasky would not apply; and, if so, whether the petitioners here have shown the existence of such circumstances in this case.

In a decision on which the petitioners rely heavily, the Seventh Circuit Court of Appeals indicated that the Tax Court may re-examine an otherwise final decision in the event that it is shown that such decision was produced by fraud upon the Court. Kenner v Commissioner, 387 F2d 689 (C.A. 7, 1968), cert. denied 393 U. S. 841 (1968), rehearing denied 393 U. S. 971 (1968). That court made clear, however, that such fraud must be " 'only that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its

impartial task of adjudging cases that are presented for adjudication'." 387 F. 2d at 691, citing 7 Moore's Federal Practice, 2d ed., p. 512. The conclusion in Kenner was that the petitioner failed to show that an adverse decision of this Court was brought about by fraud on the Court, despite his allegations that the decision contained errors and untrue statements of fact, and that his counsel failed to vigorously represent his interests and took certain actions which were prejudicial to the petitioner. The import of the decision, then, is to suggest that this Court can re-examine an otherwise final decision when such decision was produced by "fraud on the court" of the most egregious nature, and when such fraud went to the very heart of the adjudicative process. However, even the very question of whether a final Tax Court decision can be re-examined when fraud can be shown

is not entirely free from doubt. See Jefferson Loan Co. v Commissioner, 249 F. 2d 364, 367 (C.A. 8, 1957).

John J. Toscano, 52 T.C. 295 (1969), on appeal (C.A. 9, July 17, 1969), also involved a motion to vacate a prior Tax Court decision entered pursuant to a stipulation of the parties on the ground that such decision was obtained by fraud upon the Court. We did not specifically pass on the question of whether we have jurisdiction to vacate our prior decision in the case of fraud, because we found that the petitioner did not show that there was fraud on the Court. We emphasized that, even under Kenner, an "extreme situation" would be necessary to confer such power upon us. We said that, to show fraud on the Court, "(a)t the very least it must be established clearly and convincingly that the former decision was obtained as a direct result of fraud and

it should also be shown that the fraudulent conduct was deliberately undertaken to influence the Court in its decision." (52 T. C. at 298, emphasis original.) See also England v Doyle, 281 F. 2d 304, 309 (C.A. 9, 1960). We pointed out that even a fraudulent act perpetrated by one party against another, or by one party against the respondent, does not rise to the level of fraud on the Court, when such fraudulent act is not directly aimed at the Court and does not somehow impair the judicial process. See also 7 Moore's Federal Practice, 2d ed., pp. 512-513.

A classic situation involving fraud on the Court was shown in Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238 (1944), in which the Supreme Court held that the Third Circuit had not only the power but duty to vacate its earlier decision which had been brought about by fraud. That litigation involved the validity of a

patent. The party which was the proponent of the patent's validity had one of its officials write an article hailing the newness and uniqueness of the device that was the subject of the patent, and then such party convinced an unrelated individual who held a prominent position in the subject industry to sign his name to that article glorifying the new device. Such party then used that article, representing it to have been written by the outside individual who signed his name to it, in support of its patent when arguing before both the United States Patent Office, and, later, the Third Circuit Court of Appeals. The Third Circuit, in the former litigation, had given substantial effect to that article in the reaching of its decision. Subsequently, when a question was raised as to the validity of the article, the man who had falsely signed his name to the article

signed an affidavit swearing that he was in fact the author, for which act he was paid about $8,000 by the litigating party that had procured his signature initially. Years later, when the truth finally became known, the party which had lost the earlier legal battle in which the spurious article had figured asked the Third Circuit to vacate the decision that it had rendered in favor of the miscreant. When the Third Circuit refused, it was reversed by the Supreme Court, which felt that public policy dictated that a court not allow itself to remain the victim of deception and fraud, even if such fraud is discovered long after the normal appeal time has elapsed. The Supreme Court pointed out that, in a situation such as that, the wrongdoer's acts in tampering with the administration of justice in order to establish the validity of its patent had harmed far more than just the single

opposing litigatnt therefore, the question of whether to overturn the prior decision should not depend entirely on the diligence of the victimized party in discovering the fraud. The Supreme Court pointed out that this was a carefully planned and deliberately executed scheme to defraud not only the Patent Office but also the Court of Appeals, and noted that this went beyond a situation in which it is later believed that a witness whose testimony influenced the court's judgment had committed perjury.

It is manifestly clear that the Hazel-Atlas Co. case is distinguishable from the present one, leaving aside the question of the Tax Court's jurisdiction to vacate a final decision. That case involved a fraudulent scheme designed to improperly influence the court in its decision-making process, in a situation which affected the public interest above

and beyond the rights of the single injured litigant. Its facts go far beyond an untimely allegation of questionable ethics on the part of counsel, which is in essence what we have here.

The petitioners have completely failed to prove that Mr. Prieve, in entering into the stipulations which were the basis for this Court's decisions, acted beyond the scope of his authority as counsel, or outside the power conferred upon him by the petitioners' execution of a broadly written power of attorney. Even though Mr. Prieve indicated that he felt he was acting in his general role as counsel in the Tax Court proceeding, and not under the specific powers conferred upon him by the power of attorney, the fact remains that he did have certain authority under that power of attorney, and the petitioner did not show that any act of the attorney was outside such authority. The petitioner

argues that Mr. Prieve did not have the authority to settle the case without the petitioner's approval and, to support his argument, points to certain correspondence between Mr. Prieve and Mrs. Flood in June 1962, in which the lawyer indicated that he would not take further action until the petitioner returned from a business trip. However, the petitioner admitted that perhaps he and Mr. Prieve had discussed the advisability of settling the case, but claimed not to realize that such a settlement would preclude him from further arguing that he should not have to pay the tax. Moreover, Mr. Prieve testified that the stipulations were actually signed prior to June 1962 but after he had discussed the matter with the petitioner's accountant, and that he, Mr. Prieve, had written to the petitioner with respect to such signing prior to the correspondence with Mrs. Flood. Therefore,

it is not clear as to what action the June letters were referring. In the light of the evidence, the petitioner has failed to prove that Mr. Prieve lacked the authority to settle the cases on his behalf.

The petitioner makes a number of allegations that Mr. Prieve did not properly represent him in the cases. However, these allegations, even if proved, do not show fraud on the Court. We have already found that the petitioner has failed to show that Mr. Prieve was unauthorized to enter into the stipulations; it follows that we need not be concerned with whether the petitioner had specifically approved the terms of the stipulations beforehand. Furthermore, Mr. Prieve's entering into the stipulations did not constitute an affirmative representation by him that there were no substantive merits to the petitioner's case; rather, the stipulated decisions effected a compromise whereby

the petitioner was relieved from the expenses of further litigation on those issues and from the possibility of becoming liable for a greater amount if the matters reached trial. No showing has been made that, in entering into the stipulations, Mr. Prieve, an experienced tax lawyer, was not using his best professional judgment with respect to the disputed issues as he then saw them. The petitioner refers to a letter written to him by Mr. Prieve in January 1962 in which the lawyer indicated that the Government had offered to settle for $7,520.89 in penalties, and warned that if no fee payments were forthcoming from his client then he would settle the case for that amount. However, the fact that the stipulated decisions imposed a total liability upon the petitioners of $4,115.29, including both deficiencies and penalties, tends to refute rather than support the petition-

er's allegation that Mr. Prieve failed to exercise diligent efforts on the petitioner's behalf. The petitioner's voluminous briefs contain other allegations of improper actions committed by Mr. Prieve, but those need not be set forth here in detail, as it is manifestly clear that they could not establish a basis on which to find that fraud has been practiced upon the Court.

We are surprised, if the petitioner truly believed that Mr. Prieve had not properly represented him and had practiced fraud upon the Court, that he did not raise the issue earlier. Even if there was some delay in the petitioner's learning that the stipulated decisions were entered, such delay constituted only a very small portion of the 7-year period. The alleged fraud was not even asserted as a defense to Mr. Prieve's suit to collect his fees. The petitioner has

suggested that he did not see any possible approach to his problem until the decision in Kenner v Commissioner, supra, was handed down. However, that statement does not satisfactorily explain his failure to attempt to avoid having to pay the fee, if he believed that Mr. Prieve had acted fraudulently, or his apparent failure to refer to the alleged fraud in the attempt to secure an injunction against the collection of the tax. Furthermore, views suggested in subsequent litigation do not provide a justification for reopening a tax decision which had previously become final. Sweet v Commissioner, 120 F. 2d 77, 81-82 (C.A. 1, 1941); J. S. Rippel & Co., 37 B. T. A. 789 (1937).

Even were we to find that we do have power to vacate a decision brought about by fraud on the Court within the meaning of Kenner v. Commissioner, supra, t he petitioners have failed to prove that

there was fraud on the Court. It is, therefore,

ORDERED: That the petitioners' motion for leave to file a motion to vacate the decisions of this Court is denied.

(Signed) Charles R. Simpson

Judge

Dated: Washington, D. C.
February 5, 1971

State of California)
(SS.
County of Orange)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my address is 10122 Kaimu Drive, Huntington Beach, California 92646. On January 15, 1973, I served the within Petition for Writ of Certiorari on the respondent in said action, by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fountain Valley, California, addressed as follows;

Mr. Meyer Rothwacks, Esq.
Tax Division
Department of Justice
Washington, D. C. 20530

I declare that the foregoing is true and correct.

Executed on January 15, 1973, at Huntington Beach, California.

Fanny Hanon

Fanny Hanon

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1009

JOHN N. FLOOD AND CATHERINE FLOOD, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the Tax Court (Pet. App. B, pp. 33-56) is not reported and the opinion of the court of appeals (Pet. App. A, pp. 31-32) is reported at 468 F. 2d 904.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1972. The petition for a writ of certiorari was filed on January 18, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Tax Court was correct in declining to reopen stipulated decisions determining petitioners' tax liabilities which had become final seven years earlier.

STATUTES INVOLVED

The pertinent portions of Sections 7481(1) and 7483 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, p. 7.

STATEMENT

Petitioner[1] during the early 1950's was engaged in the sale of mobile homes on time payment plans. (II-R. 17, 39.)[2] Notes taken in payment were sold by petitioner to finance companies at a discount. The finance companies ordinarily held back a portion of the sale price of the notes for a period of time to insure against possible defaults on the notes. The withheld amounts were credited to petitioner in so-called "dealer reserves." Petitioner did not consider the dealer reserves as being taxable to him at the time they were credited to him on the finance companies' books, but only at the later time when, and to the extent that, the unused portion was released to him. There was at that time a split of opinions among the courts of appeals as to when these sums were taxable. In 1959, however, this Court, in *Commissioner* v. *Hansen*, 360 U.S. 446, held that the sums were taxable when credited.

Prior to the *Hansen* decision, petitioner had engaged a tax attorney, Charles Prieve (Prieve) to represent him

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[1] Petitioners are husband and wife who filed joint federal income tax returns for most of the years in issue. As it is the activities of the husband alone with which this petition is concerned, he alone is referred to as petitioner.

[2] "I-R." and "II-R." references are to the two-volume record on appeal in the court of appeals, a copy of which has been lodged with the Clerk of this Court.

in his tax difficulties.[3] Petitioner granted a broad general power of attorney to Prieve. While represented by Prieve, petitioner signed an election to be taxed on his dealer reserve income under provisions of the Dealer Reserve Income Adjustment Act of 1960, P.L. 86-459, 74 Stat. 124, which had been enacted to provide certain relief to taxpayers affected by the *Hansen* decision. Following this election, Prieve, sometime prior to March, 1962, reached a settlement agreement with the Commissioner in regard to petitioner's total tax liabilities. (II-R. 60.) On June 7, 1962, and June 14, 1962, the Tax Court entered stipulated decisions determining petitioner's liabilities for income taxes and penalties for 1951, 1952, 1953 and 1954. (I-R. 41-43.) No appeal was taken from these decisions, which, under the provisions of Sections 7481 and 7483 of the Internal Revenue Code, thereby became final in September, 1962.

Nearly seven years later, on July 8, 1969, petitioner filed with the Tax Court a motion for leave to file a motion to vacate these decisions. The motion to vacate, which petitioner lodged with the court, was based on the claim that the earlier decisions had been obtained by "fraud on the court." (I-R. 44.) After a hearing was held the Tax Court denied these motions (I-R. 61-64); this denial was vacated, however, when the court became aware that petitioner had not received notification of the hearing (I-R. 102). A second hearing was then held at which petitioner and Prieve testified concerning the entry of the

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[3] Petitioner had not filed returns for 1951 and 1952 until 1957. In addition to disputes over the treatment of dealer reserves, there were also issues for 1951 through 1954 concerning net operating loss carryovers, valuation of inventories, the penalties for failure to file returns and declarations of estimated tax, and negligence penalties.

original decisions. After analysis of the testimony and evidence, the Tax Court denied petitioner's motions, finding that no showing had been made that the earlier decisions had been procured by "fraud on the court" or in any other improper manner. (Pet. App. B.) The court of appeals affirmed this finding. (Pet. App. A, pp. 31-32.)

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review of the Tax Court's factual determination.

The finality provisions of the Internal Revenue Code of 1954 with respect to Tax Court decisions (Secs. 7481 and 7483, Appendix, *infra*) have always been very strictly construed. This Court has held that an appellate court may not reopen such a decision once it has become final under the statutory provision. *Helvering* v. *Northern Coal Co.*, 293 U.S. 191; *R. Simpson & Co.* v. *Commissioner*, 321 U.S. 225. Several circuit courts, however, have recently held, relying on this Court's opinion in *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U.S. 238, that when a Tax Court decision has been procured by fraud on the court, it is not a decision within the meaning of the statute and therefore cannot be final. *Kenner* v. *Commissioner*, 387 F. 2d 689 (C.A. 7); *Toscano* v. *Commissioner*, 441 F. 2d 930 (C.A. 9). In the present case, however, the courts below found no evidence which would support a factual finding that fraud had occurred. There is no reason for this Court to review a factual finding concurred in by the trial court and the court of appeals. See, *e.g.*, *Comstock* v. *Group of Investors*, 335 U.S. 211, 214.

All of petitioner's allegations of fraud and other errors are solely designed to show that the stipulated 1962 decisions charged him with excessive deficiencies in that

they treated as income to him in the years so credited the entire amounts credited to his dealer reserves by finance companies, regardless of whether or not these amounts were ever actually received by him. As recognized by the court of appeals (Pet. App. A, pp. 31-32), this stipulation was entered into by his attorney in recognition of the mandate of this Court in *Commissioner* v. *Hansen,* 360 U.S. 446, which was handed down while petitioner's case was pending before the Tax Court. Until this Court overrules that decision, no other result could be reached than that stipulated to by petitioner's counsel.

Petitioner now seems to allege additionally (Pet. 26, 27) that he had included the dealer reserves in his original returns for the years in question and that he is being taxed twice on the same amounts. This contention, which we believe to be incorrect, is raised for the first time in this Court and is inconsistent with the entire tenor of his complaint in the courts below to the effect that he was not required to report the dealer reserves as income in the year credited to his reserve account, but only when actually released by the finance company and paid over to him.[4]

Finally, with respect to petitioner's charge that the Tax Court's disposition relied upon a power of attorney never introduced into evidence, there was testimony (II-R. 78-80) concerning the powers granted by this instrument. While the power of attorney was not introduced into evidence in the Tax Court because not then available,

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[4]In the court of appeals petitioner stated (Br. 4) that the dealer reserves were not included in income "until received by the petitioners," and that he "followed the practice of reporting dealer reserve income in the year in which it was received" (Br. 5).

it was later located and, for the information of the court of appeals, reproduced in the appendix to respondent's brief in the court of appeals. Petitioner has never challenged the authenticity of the document as there reproduced. Moreover, to the extent that the scope of the granted power of attorney was relevant to his case, petitioner had the burden of proof in the Tax Court[5] of showing fraud or other wrongdoing, and of discrediting the testimony as to the power of attorney, and the consequences of the failure to produce the document in question must rest upon him.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
WILLIAM A. FRIEDLANDER,
MARY J. MCGINN,
Attorneys.

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[5] "[T]here is a heavy burden both of particularized pleading and of proof upon the one who seeks to impeach an order or decree of a court." *Kenner* v. *Commissioner*, 387 F. 2d 689, 691 (C.A. 7).

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1964 ed.):

Sec. 7481. Date When Tax Court Decision Becomes Final.

The decision of the Tax Court shall become final—

(1) *Timely petition for review not filed.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; or

* * * * *

Sec. 7483. Petition For Review

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.